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SUMMARY

In this reply to Four Jacks Broadcasting Inc.'s ("Four Jacks") "Opposition to Petition to Deny Application" ("Opposition"), Scripps Howard Broadcasting Co. ("Scripps Howard") will demonstrate that Four Jacks has failed to adequately address several critical issues raised by Scripps Howard.

First, Four Jacks has ignored the fact that the tower is currently 1209 feet AMSL, not 1249 feet AMSL as it incorrectly reported in its application. It has also failed to address the misstatements which follow from its use of an incorrect height: its proposal requires a change of height of the tower and FAA approval is necessary. Moreover, it has ignored the fact that its proposal will render the designated tower unsafe. Since it must build a new tower, Four Jacks has understated the estimated cost of the proposed facility. It has completely disregarded the Commission's concern with protecting the FCC monitoring station located in Laurel, Maryland, from interference. Four Jacks has also failed to evaluate possible intermodulation interference problems with the other tower users.

Finally, serious questions regarding Four Jacks character have been raised which Four Jacks has ignored. The behavior of the Four Jacks principals with respect to both WPTT-TV in Pittsburgh, Pennsylvania and this proceeding evidences a lack of candor that is inconsistent with the duties of a broadcast applicant.

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Exhibit A:	Affidavit of Donald G. Everist
Exhibit B:	Affidavit of Matthew J. Vlissides, P.E.
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Exhibit D:	Federal Aviations Administration Acknowledgement of Notice
Exhibit E:	Letter from John R. Reisinger Baltimore County Building Engineer (February 20, 1992)
Exhibit F:	Article from Pittsburg Post-Gazette
Exhibit G:	Scripps Howard's letter to The Commision (February 19, 1992)

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20534

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FEB 25 1992

Federal Communications Commission
Office of the Secretary

In re Application of)
Four Jacks Broadcasting, Inc.)
For A Construction Permit for) FCC File No. BPCT-910903KE
a New Television Facility on)
Channel 2 at Baltimore, MD)

To: The Chief, Mass Media Bureau

REPLY TO
OPPOSITION TO
PETITION TO DENY APPLICATION

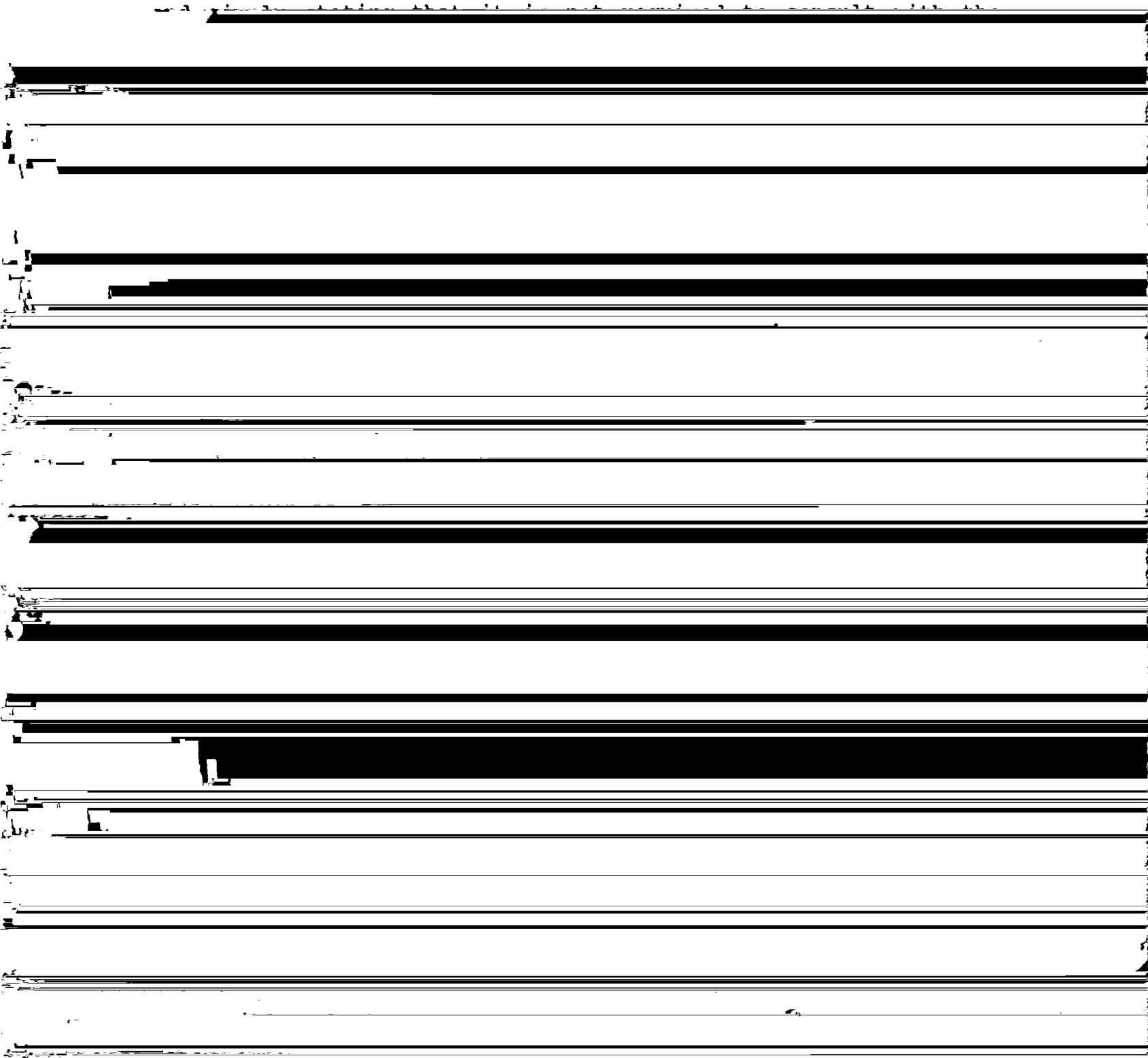
Scripps Howard Broadcasting Company ("Scripps Howard"), licensee of television Station WMAR-TV, Baltimore, Maryland, hereby replies to the "Opposition to Petition to Deny Application" filed by Four Jacks Broadcasting, Inc, ("Four Jacks") on February 12, 1992. Scripps Howard's application for renewal of Station WMAR-TV is mutually exclusive with Four Jacks' application for a construction permit for Channel 2.

I. Introduction

In its opposition, Four Jacks has failed to adequately address several critical issues. It has completely ignored its application's inaccuracies as to current tower height and the required change in tower height, and has misstated the necessity for FAA approval. Furthermore, despite a disingenuous attempt to discredit the statement of Mr. Matthew Vlissides, it has failed to counter concerns raised with respect to the safety of its proposed

tower. This in turn leads Four Jacks to underestimate the cost of the proposed facility.

Four Jacks' opposition also seeks to trivialize the Federal Communication Commission's ("Commission" or "FCC") concern over protection to its monitoring station in Laurel, Maryland, by ignoring the policy underlying § 73.1030 of the Commission rules



the "hard look" processing review applicable to FM also applies to TV. In fact, Scripps Howard's "Petition to Deny" specifically notes that separate rules apply to FM applications and that the Commission need not apply a "hard look" approach to find the Four

approval. Together, these misstatements constitute substantial omissions of vital data which preclude the Commission from being able to process the application and thus render the application substantially incomplete.³

3. Furthermore, Four Jacks cannot now amend its application to supply the omitted, correct data. According to Commission rules, TV applications may be amended as a matter of right only until the date specified in the Commission's Public Notice announcing the acceptance for filing of the last-filed mutually exclusive application. 47 C.F.R. § 73.3522(a)(2). In this proceeding that date, January 28, 1992, has passed. Furthermore, pre-designation amendments will only be considered upon a showing of good cause. Id. Four Jacks, whose principals control the tower through Cunningham and were responsible for removal of the WBFF antenna from the tower, cannot meet the good cause requirement that the need for a pre-designation amendment is not due to the voluntary act of an applicant.

4. This is not inconsistent with the Commission's statements contained in the NPRM. Citing Azalea⁴, the Commission stated that

³ Four Jacks has contacted the FCC and the FAA and claimed that the notification of change in tower height filed with both agencies by Nationwide Communications Inc., a lessee of the Four Jacks principals, is void. As will be discussed infra, Scripps Howard contests this assertion. However, the FAA has given Four Jacks authorization to build to the 1249-foot level. Even so.

the "TV approach...permits applicants to correct many types of defects and does not preclude multiple amendments for this purpose." NPRM at ¶ 16. The failure of Four Jacks to provide the correct height of a structure it owns, along with its failure to notify the Commission that a change in height will be required by its proposal and that FAA approval is required are not the types of defects saved by this policy. Azalea and its progeny generally permit post-designation amendments concerning basic qualifying issues, but they do not control the tenderability of an application due to the failure of an applicant to provide essential engineering information. See e.g., New Broadcasting Corp., 44 F.C.C.2d 386 (1973) (amendment concerning concentration of control issue involved); 5 KW, Inc., 33 F.C.C.2d 895 (1972) (amendment of financial information permitted).

5. Finally, Four Jacks' arguments do not even attempt to answer the basic objection that it has provided false information to the Commission in its application. The tower is still currently only 1209 feet AMSL in height, a change of height will be required to effectuate the Four Jacks proposal, and FAA approval will be required. The impact of Four Jacks' demonstrated intent to submit and stand by the false data is discussed infra.

B. Tower Height

6. With respect to tower height, Scripps Howard does not misunderstand the facts (Opposition at ¶ 4); Four Jacks ignores them. Cunningham, Four Jacks' minion, may have intended to maintain its airspace clearance for 1249 feet AMSL after it reduced

the actual height to 1209 feet AMSL, but it can cite no authority for the proposition that Four Jacks may report the tower height in accordance with its intentions as opposed to reality. Indeed, FAA and FCC rules expressly preclude alteration of a tower's height without disclosure, whether or not the sponsor of the change may hope to someday utilize that airspace again. Four Jacks' principals failed to accurately report the actual height of the tower when they changed it, and now they have attempted to benefit from this misconduct by falsely claiming that the tower height has not been changed. Such conduct is impermissible.

C. FAA Approval

7. Even though Four Jacks has sought to nullify the effect of Nationwide Communications Inc.'s ("Nationwide") notice to the FAA and the Commission of the 40 foot reduction in tower height, this notice was in fact necessary and effective and thus, new FAA approval for construction up to 1249 feet AMSL is required.

8. Four Jacks asserts that Nationwide's action is void because it has no authority to request that the airspace clearance be reduced. (Opposition at n.3). Four Jacks' statement reflects an inexcusable ignorance of Commission and FAA rules, rules which it has in fact violated. Nationwide was not "requesting that the airspace clearance be reduced." Id. It was complying with its obligation as a Commission licensee to inform the Commission and the FAA that the height of the tower had been reduced. Section 73.1690(b)(1) of the Commission rules imposes upon Nationwide a duty to notify the Commission of any change in the overall height

of the antenna structure. Furthermore, § 17.7 of the Commission's rules requires Commission licensees to notify the FAA of any construction or alteration occurring more than 200 feet in height above ground level at its site. 47 C.F.R. § 17.7. Such an obligation is not predicated on the licensee having the authority to ask for a reduction in airspace clearance. Any subsequent reduction in airspace clearance is a function of the effect given such notification by the FAA, not of the act of notifying. Thus, Nationwide's action, taken in order to ensure compliance with Commission regulations, is not void. See also discussion infra at 21, and Exhibit G.

9. Furthermore, Four Jacks was also required by § 73.1690(b)(1) of the Commission's rules to notify the FCC of the reduction in tower height and by § 17.7 to make the same notification to the FAA. The obligation to notify the FAA is reiterated in rule § 77.13(a)(1) of the FAA regulations, which mirrors the FCC regulation and applies to sponsors of an alteration. 14 C.F.R. § 77.13(a)(1). Nothing in these regulations permits the licensee or sponsor to ignore them because it "intends" to increase height back to a previously approved height at some point in the future.⁵ Four Jacks failure to make such notification and subsequent attempts to nullify the notification made by

⁵ Furthermore, Scripps Howard finds it very irregular that Herman E. Hurst, Jr., without first hand knowledge, seeks to attest to the intention of Cunningham. How does Mr. Hurst know what Cunningham's intention was?

Nationwide evidences its complete disregard for Commission rules, as well as the rules of other agencies.

10. Four Jacks principals, concerned only with its ability to maintain airspace clearance to 1249 feet AMSL, have contacted the FAA through an agent and received approval for clearance to this height. See Exhibit D. The principals of Four Jacks, however, appear to have neglected to inform the FAA of its current plans to use that airspace for Channel 2 full service VHF television.

11. Even if the FAA should ultimately uphold its current decision with respect to this matter, Four Jacks has still misrepresented the need for FAA approval. The FAA has conditioned its approval of Four Jacks' use of the airspace to 1249 feet AMSL by an EMI study should Four Jacks, as it does, propose to use the

~~additional 10 feet of clearance to 1259 feet AMSL.~~

E. Tower Structure

13. As a preliminary matter, Scripps Howard will of course agree with Four Jacks that "[t]ransmitters are not placed on top of towers." (Opposition ¶ 7). However, it is obvious on the face

twenty-two transmission lines⁷, Mr. Vlissides accounted for shielding by reducing the percentage of exposure after a certain number of lines. Thus, with the first eight lines, the ladder and the conduit, Mr. Vlissides assumed 100 percent exposure; the next

16. Further, Mr. Hurst's statement that only one rigid transmission line is planned (Opposition, Hurst at 9) raises an issue as to the type of auxiliary transmission system Four Jacks intends to use if the single transmission line fails. See Exhibit A at 6-7.

17. Moreover, a computer analysis of the tower substituting Hurst's statements as to the rigid line and the single cylindrical bundling⁸ of the other lines, which is referred to as case 4, again demonstrates that the tower will be rendered unsafe if used as proposed. See Exhibit B at 7. The original Vlissides report showed that sixty percent of the tower leg sections were overstressed between 1.7 and 83.5 percent. A second report, which includes case 4 and incorporates Mr. Hurst's data, shows that at least 30 percent of the tower leg sections are overstressed from 0.1 to 67.7 percent. Id. at 6.

18. Four Jacks' contention that the FCC cannot rely on Mr. Vlissides' report is completely disingenuous. Four Jacks states that "[s]ignificantly, Mr. Vlissides' statement contains a broad disclaimer in which he assumes no responsibility for the information or conclusions in his report." (Opposition at ¶ 8). This blatantly incorrect characterization of the standard waiver provision contained in the Vlissides report is simply another attempt by Four Jacks to support its position through distortion.

⁸ Furthermore, as noted by Mr. Vlissides in his second report, a single bundle is highly impractical. Exhibit B at 6. In case 3 and case 4, Mr. Vlissides used the information for the Alan Dick Superturnstile Antenna. Id.

The first sentence of the statement disclaims liability for the condition of the tower, not the results of his analysis. See "Petition to Deny" Exhibit C at 8, Exhibit C at 9. The next sentence explains that his analysis is based on state of the art technology and that he is under no duty to up date the report if such technology is subsequently modified or revised. Id. Finally, the last sentence disclaims any consequential or incidental damages sustained as a result of this report. Id. Nothing in this waiver suggests that Mr. Vlisides' report is unreliable. As evidenced by Exhibit B at page 7, Mr. Vlisides is prepared to stand by the veracity of his report. Mr. Vlisides concludes:

the subject tower is not adequately designed to support the Channel 2 antenna and its transmission line. Therefore, the subject tower must not be used for the installation of the Channel 2 Antenna.

Exhibit B at 7.

19. Scripps Howard is not basing its claim that the tower is unsafe on conclusory allegations; it is basing this claim on facts contained in the sworn affidavit of a structural expert. This affidavit was in turn based on personal observations of the structure and on reasonable assumptions based on Mr. Vlisides' years of experience in the field. Moreover, the cases *Four Jacks* cites to support its contention that conclusory allegations are insufficient to support a petition to deny are completely distinguishable from this case. WFBM, Inc., 30 Rad.Reg.2d (P&F) 1366 (1974), concerned a petition to deny submitted without supporting affidavits. Translator TV, Inc., 25 Rad.Reg.2d (P&F)

1106 (1972), concerned a petition to deny supported by an affidavit which contained little supporting technical data. Scripps Howard's position that the tower is unsafe is supported by an affidavit which contains significant supporting technical data. See Exhibit C.

20. Finally, it appears that it is Four Jacks which does not understand the relationship between site availability and site suitability. The cases cited by Scripps Howard in its "Petition to Deny" and referred to by Four Jacks in its opposition stand for the proposition that a site that is available to the applicant must also be suitable before the Commission will consider it an

that the Commission, any more than a site owner, would approve a site which was found to be hazardous.

F. Electromagnetic Interference

22. Four Jacks completely ignores potential EMI problems. Mr. Hurst states that "clearly, the Four Jacks proposal is not subject to "proposed rules" or "expected processes" of any type." (Opposition, Hurst statement at 8). However, Mr. Hurst, a radio engineer, is not an expert in FAA procedures. Scripps Howard's expert, Michael L. Moore, is an Airspace and Procedures Specialist who was employed by the FAA for twenty-two years. Mr. Moore stated that "the Four Jacks application requires an aeronautical study by the FAA." Petition to Deny: Exhibit B at 5. Mr. Moore's statement is further supported by the fact that the FAA has conditioned its recent grant of airspace clearance to 1249 Feet AMSL on the completion of an EMI study. See Exhibit D.

G. Protection to the FCC Monitoring Station

23. Four Jacks, in an attempt to nullify the probable effect its proposal will have on the FCC Monitoring Station in Laurel, Maryland, selectively quotes from § 73.1030(c) of the Commission Rules. Mr. Hurst states:

Nowhere within this rule section does the FCC require any advance consultation with, or approval from, the monitoring station. Rather, the FCC rule "advises" or "suggests" that applicants give consideration and/or seek consultation when the proposed transmitter site is in the vicinity of the monitoring station.

(Opposition, Hurst statement at 3)(emphasis in original). Once again, by loosely construing the language of a Commission rule, Four Jacks is evidencing its disregard for the rules, policies and concerns of the Commission. The applicable Commission rule states:

(C) Protection for Federal Communications Commission monitoring stations. (1) Applicants in the vicinity of an FCC monitoring station for a radio station authorization to operate new transmitting facilities or change transmitting facilities which would increase the field strength produced over the monitoring station in excess of that previously authorized are advised to give consideration, prior to filing applications, to the possible need to protect the FCC stations from harmful interference.

(2)[I]f there is any question whether field strength levels might exceed the threshold value, advance consultation with the FCC to discuss any protection necessary should be considered.

47 C.F.R. § 73.1030 (C)(1) & (2) (emphasis added). Mr. Hurst is correct in stating that the rule does not specifically require consultation and Scripps Howard never claimed that it does. Scripps Howard noted that the rule "informs all applicants of the need to protect FCC monitoring stations against interference." (Petition to Deny at 15). Four Jacks, however, is trying to ignore this responsibility.

24. This rule evidences the concern of the Commission that its monitoring stations be protected and that any potential problems should be addressed as early as possible, preferably prior to the filing of an application which may interfere with such stations. Four Jacks has evidenced its intention to ignore this concern. Further, Four Jacks obviously failed to take this

potential interference into consideration before filing its application and is now trying to claim that, because it is not specifically required to consult with the Commission, the problem does not exist.

25. Although Scripps Howard's petition and supporting engineering statement contained an inconsistency as to predicted signals emanating from Four Jacks proposed site,⁹ the fact is that, based on a direct wave calculation, which is required by § 73.1030 and which is not used by Mr. Hurst, the predicted field base is 103.5 dBu for visual carrier and 93.5 dBu for aural carrier. See Exhibit A at 3. Even Mr. Hurst admits that the predicted signal will be over the Commission's prescribed limit of 80 dBu. (Opposition, Hurst statement at 3). Thus, there is a potential interference problem.

H. Intermodulation Interference

26. With respect to FCC Form 301 Section V-C question 14, Mr. Hurst states that this question "does not require any assessments be made or any study performed." (Opposition, Hurst at 7). However, that question requires that Four Jacks

attach as an Exhibit a description of the expected, undesired effects of operations and remedial steps to be pursued if necessary, and a statement accepting full responsibility for the elimination of any objectionable

⁹ In fact, both sets of figures are correct. The figures contained in Scripps Howard's "Petition to Deny" are based upon F(50,50) propagation curve and the figures contained in Mr. Everist's affidavit were based upon the direct wave calculation. See Exhibit A at 3.

interference [including that caused by intermodulation] to facilities in existence or authorized prior to grant of this application.

Four Jacks has accepted responsibility, but it has not described the expected undesired effects of operations and subsequent necessary remedial steps. In order to do this, it must take into account the other tower users. Without doing so, Four Jacks' statement that it will take responsibility for possible intermodulation interference is baseless and unreliable. See Exhibit A at 4.

I. Cost of Construction and Operation

27. Scripps Howard's estimated cost for construction of a new tower of \$350,000 is not an "inflated estimate" (Opposition at ¶ 18), rather it reflects an extremely conservative estimate. See Exhibit B at 7.

28. Furthermore, any additional expenditures Four Jacks must make for construction costs will correspondingly reduce the amount left for operations. Thus, Four Jacks has underestimated the total cost of the proposed facility.

III. Character Issues

29. Four Jacks' opposition to Scripps Howard's discussion of character issues relies on the claim that Scripps Howard's petition lacked an affidavit supporting the factual assertions made therein and that this omission precludes Commission consideration of these matters. In fact, Scripps Howard's petition relies on facts that are already a matter of record with the Commission, and thus an affidavit would be superfluous. Scripps Howard asks the Commission

to take official notice of (1) its records in connection with the assignment of Station WMAR-TV from Gillett Broadcasting to Scripps Howard (File No. BALCT-900910KE); (2) its records in connection with the consent to assignment of license of Station WPTT-TV to WPTT, Inc. (BALCT-910117KF); and (3) the pending complaint by WNUV-TV 54 Limited Partnership referenced in Scripps Howard's "Petition to Deny" and particularly the "Response to Complaint and Request for Ruling" filed by Sinclair Broadcasting Group, Inc. ("Sinclair") on February 6, 1992.

30. The prima facie case that Four Jacks' principals, through co-owned Sinclair, have engaged in serious misconduct in Pittsburgh is evident simply by a review of the original record of the WPTT-TV assignment application, combined with the subsequent change in circumstances admitted in Four Jacks/Sinclair's response to the WNUV-TV 54 Limited Partnership complaint. The record before the Commission at the time it approved the assignment of Station WPTT-TV to WPTT, Inc., showed that there was--at a minimum--substantial risk of improper control by Four Jacks' principals (through Sinclair) over Station WPTT-TV. That is, in assessing whether an unauthorized exercise of control has occurred, the Commission looks at control in three key areas: finances, personnel, and programming. See, e.g., Southwest Texas Public Broadcasting Council, 85 F.C.C.2d 713, 715 (1981). Under the terms of the multitude of agreements controlling the sale of Station WPTT-TV, Four Jacks/Sinclair exercised substantial control in two of these three elements by (1) dictating the identity of WPTT-TV's general

manager and of all its legal counsel for 10 years, and (2) essentially controlling the finances of the station by means of a wide variety of controls placed over WPTT Inc.'s actions to protect Sinclair's huge remaining investment in the station. Accordingly, in approving this clearly extraordinary proposal on the basis of its supposed benefit to minority ownership, the FCC staff expressly relied on the lack of any involvement by Four Jacks/Sinclair controlled entities in Station WPTT's programming or day-to-day operations. See Letter to Martin R. Leader from Chief, Video Services Division at 5 (approving the assignment on June 21, 1991).

31. Subsequent events promptly showed these reliances to be ill-founded. Shortly after closing and apparently without any notice to the FCC of what Sinclair itself has admitted was a crucial "changed circumstance," Sinclair/Four Jacks entered into an agreement to start programming "less than 40% of the day" on Station WPTT-TV. See Sinclair's Response to Complaint at 42.¹⁰

32. It is an unavoidable conclusion that Sinclair's new direct involvement in all three of the danger areas for assessing when an unauthorized exercise of control has occurred mandates a finding that Sinclair/Four Jacks is currently in violation of the Commission's cross-interest policy, if not its multiple ownership rule. Such a conclusion is not a prohibited revisiting of the Commission's approval of the assignment because the staff expressly limited its approval to that of a "debtor-creditor" relationship

between these stations. Sinclair did not seek any waiver of either the duopoly rules or the cross-interest policy to permit closer ties, and the Commission staff did not and could not approve any ongoing close relationship between these supposedly competitive stations.

33. While certain anonymous complainants raise even more serious charges about the alleged joint operation of the stations¹¹-the facts as admitted by Sinclair/Four Jacks are sufficient to show that there is an ongoing violation of Commission policy. Importantly, this is a violation that Sinclair/Four Jacks apparently would never itself have revealed to the Commission. Sinclair's failure voluntarily to disclose the critical changed circumstances in Pittsburgh is particularly telling because, as discussed below, it is consistent with Four Jacks' pattern of

dealt with the Commission in the forthright and candid manner required of broadcast applicants. In response to Scripps Howard's uncontested observation that Four Jacks misstated the existing height of the tower on which Four Jacks proposes to place its Channel 2 antenna, Four Jacks has confirmed that its principals knew the tower height had changed and thus necessarily intended to provide the incorrect information to the Commission. See Opposition at ¶ 6.

35. It would be a serious omission if Four Jacks' principals simply had been negligent in offering the inaccurate height for their tower, but it is far more serious that they intended to state an erroneous height. Contrary to Four Jacks' claim, this false statement is not warranted by the fact that Four Jacks' principals never complied with the applicable regulations of several government agencies that tower height reductions must be reported.

Scripps Howard's February 19th letter to the Commission (copy attached as Exhibit G) describes in more detail the specific violations of FCC and FAA rules which occurred by Four Jacks' principals' failure to report the height change. Further, as noted above, there is no provision in the FCC or FAA rules that contemplates "reserving" approved air space on a "temporary" basis. In any event, no such policy could possibly apply to protect unused space solely on the basis of a speculative hope that some unidentified party at some unidentified time in the future might be interested in using that space. Thus, Four Jacks' principals' prior misconduct in not earlier correcting erroneous data in the

records of the various government agencies concerned with the tower's height does not excuse the misstatement; it compounds the seriousness of Four Jacks' offense.

36. In light of Four Jacks' pleading's confirmation that the misstatement was intentional, it plainly appears to be a misrepresentation of a relevant fact to the Commission. As pointed out in Scripps Howard's petition to deny, the statement of a false tower height has substantial impact on the degree of technical scrutiny afforded Four Jacks' application. Thus, Four Jacks had at least two apparent motives to intentionally misrepresent this fact:

- (1) to streamline Commission consideration of its application; and
- (2) to avoid confessing its principals' prior misconduct in not reporting the tower height change when it occurred.

37. While in this case the substance of the misrepresentation is serious--involving a possible threat to air safety--the Commission and the courts have confirmed repeatedly that it is not the subject matter of the misrepresentation itself that is as relevant as the demonstrated willingness of the applicant to mislead the Commission. See, e.g., FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). Ensuring the veracity of the Commission's applicants has become even more important as the number of FCC rules declines and as the resources available to the FCC to police licensee misconduct become scarcer. Here, a misrepresentation of a material fact was made directly to the FCC, and the applicant's